TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted] 145

THE STATE OF TEXAS, PLAINTIFF IN ERROR,

vs.

EASTERN TEXAS RAILROAD COMPANY, E. R. PERKINS, F. W. GREEN, *ET AL.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED NOVEMBER 3, 1923.

([redacted])

(29,229)

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INDEX.

	Original.	Print.
Record from the U. S. district court for the western district of Texas	1	1
Caption	1	1
Agreed statement of the case	1	1
Opinion of the court, West, J.	12	9
Stipulation as to record on appeal	27	19
Order as to agreed record on appeal	28	20
Final decree	29	20
Assignments of error	31	22
Petition for appeal	33	23
Order allowing appeal	35	24
Citation on appeal and service	36	24
Clerk's certificate	37	25

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 20, 1922.

1 *Caption.*

Be it remembered that at a regular term of the United States District Court for the Western District of Texas, holding its session at Austin, Texas, and which term began on the — day of ——, A. D. 1922, and continued to and including the — day of ——, 1922, there came on to be heard and determined before the Honorable Duval West, Judge of said Court, Cause No. 325 in Equity, entitled, Eastern Texas Railroad Company, plaintiff, vs. Railroad Commission of Texas, et al., defendants; and that this being a cause in which an appeal is taken upon an agreed statement in compliance with Equity Rule 77, the proceedings herein necessary to be considered on this appeal are as follows:

The United States District Court, Western District of Texas, Austin Division, August 11th, 1922.

In Equity.

No. 323.

STATE OF TEXAS, Plaintiff,

vs.

EASTERN TEXAS RAILROAD CO., et al.

In Equity.

No. 325.

EASTERN TEXAS RAILROAD COMPANY, Plaintiff,

vs.

RAILROAD COMMISSION OF TEXAS et al.

Statement of the Case.

Showing how the questions arose and were decided in the District Court, and setting forth so much only of the facts alleged and proved as is essential to a decision or such questions by the appellate court, those matters being correctly presented in the findings and opinion of the District Judge as follows, to-wit:

In equity Suit No. 323, by the State of Texas to enjoin the Eastern Texas Railroad Company from discontinuing operation and from abandoning and dismantling its road. The Railroad Company, by Cross-action, seeks injunction against the State from interfering or preventing abandonment of service and dismantling.

In equity Suit No. 325, Eastern Texas Railroad Company sues Railroad Commission of Texas and others for injunction
2 preventing interference with its intention to permanently abandon operation and to dismantle its road.

These two cases relate to identical issues of law and fact, and are considered together.

The Eastern Texas Railroad Company called Railroad on June 3rd, 1920, applied to the Interstate Commerce Commission for authority to abandon operation, and to dismantle and remove its road. The State of Texas thereupon—July 14th, 1920, entered suit against the Railroad in a State Court to enjoin such action, and a temporary writ of injunction was issued. The case was removed to this Court by Railroad, and was here numbered 323. On December 2nd, 1920, the Interstate Commerce Commission granted the Certificate authorizing abandonment of the Railroad. The temporary injunction theretofore issued by the State Court was dissolved by his Court.

Railroad, on Decmber 20th, 1920, brought its independent suit in Equity, numbered 325 in this Court, against the Railroad Commission of Texas and others, seeking to enjoin defendants from interfering with Railroad's right to abandon, dismantle and salvage its property as granted by the Interstate Commerce Commission; on April 29th, 1921, a temporary writ issued as prayed for and, awaiting result of appeal in number 323, no further action was taken.

The State appealed to the Supreme Court of the United States. The case was there docketed and numbered 298. That Court issued its order April 21st, 1921, suspending this Court's order dissolving injunction issued by the State Court, and required that the status quo be preserved.

The State of Texas and others, on September 10th, 1921, brought suit in the United States District Court for the Eastern District of Texas, against the United States, the Railroad, and others, to annul the Interstate Commerce Commission's order and certificate of abandonment. Railroad's motion to dismiss was granted
3 September 21st, 1921; and an appeal was taken and filed in the Supreme Court of the United States October 1st, 1921, docketed and numbered 563. The two cases appealed, numbers 298 (323) and 563, were considered together, and were both disposed of in the Court's opinion of March 13th, 1922—(42 Supreme Court Reporter, 281) each case being reversed and remanded for further proceedings; the Supreme Court holding that the Commission's Order and Certificate of Abandonment issued under authority of Sections 18, 19 and 20 of the Transportation Act of 1920 (Sec. 402, 41 Stat. 456-477, was adequate to sanction a discontinuance of Railroad's Interstate and Foreign business; that the road was entirely within a single state, owned and operated entirely by a corporation of that state, not a part of another line. its operation solely in intrastate commerce, and its abandonment or discontinuance was a question of local concern; that in these circumstances the Commission was without authority over its purely intrastate business. Whether, apart from the Commission's Certificate, the Railroad is entitled to abandon its intrastate business was not before the Court.

Conforming to this opinion Railroad, in case number 325, on April 29th, 1922, amended its Bill and no longer relied on the Commission's Certificate and Order authorizing abandonment of its railroad properties in intrastate commerce. It declared that its property would be confiscated and taken without due process if denied the right to abandon operation in intrastate commerce, and to dismantle, salvage, sell, remove and dispose of its property for the benefit of its stockholders, because contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States; and also violative of the provisions of the Constitution of the State of Texas, and praying for injunction,—a temporary writ being granted on the same day.

In case numbered 323 Railroad filed its Amended Answer, Counter-Claim, and Cross-Action, May 13th, 1922, setting up in substance matters alleged in the Amended Bill in that case, and seeking relief by injunction. The Railroad Commission of Texas, and
4 others, defendants, by Supplemental Answer, took issue, May 29th, 1922; and filed a joint motion to (1) dissolve the temporary injunction theretofore therein issued, and (2) to dismiss the complainant's suit.

In case No. 323 The State of Texas asks that the Railroad be enjoined from abandoning operation and dismantling its road, and be required to continue operation. The Railroad by cross-action seeks injunction preventing interference with its right to abandon and dismantle. In No. 325 the Railroad asks that the Railroad Commission of Texas, The Attorney General of Texas, and others, by injunction be prevented from interfering with Railroad abandoning and dismantling its road.

The Railroad contends that it has the right to abandon operation of its road and to dismantle it and dispose of its physical properties by sale or otherwise to the best interest of its stockholders because it is insolvent, and the revenues derived from operation are not sufficient to meet expenses and allow a fair return upon the investment, with no reasonable future prospect of such revenues; and says that to compel it to continue operation and to prevent it from dismantling would be to take its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States; and, likewise, contrary to Article 1, parg. 17, of the Bill of Rights; and Section 10 of the Constitution of the State of Texas.

The State of Texas and its Railroad Commission contend that by virtue of the Charter contract entered into with the State, and because of express provisions of its statutes, the Railroad must maintain and operate its road in any event, and that the Fourteenth Amendment is without present application; Also take issue with Railroad on the Facts.

The Interstate Commerce Commission's Certificate of Public Convenience and Necessity authorized the Railroad "to abandon the operation of all of its lines of railway now owned and op-
5 erated by it; and to take up, dismantle or remove any part or all of the property of said Company; and in any lawful manner to dispose of any or all parts of said property so taken

up, dismantled or removed, or as it is now situated." The Supreme Court, in State of Texas vs. Railroad, supra, as noted, holds that this Certificate was sufficient to "sanction a discontinuance" of Railroad's interstate and foreign business only, and the questions (1) whether the State of Texas, operating through its Railroad Commission, and by force of its statutes and the charter contract, can compel reconstruction and operation of the Road as an intrastate carrier, or (2) whether Railroad may "abandon and dismantle" as to intrastate commerce, are to be answered.

Statement of Facts.

The Interstate Commerce Commission, considering the same issues in question here, found facts—admitted by the State's Counsel to be true—as follows:

"The Eastern Texas extends from Lufkin, Texas, in a Westerly direction 30.3 miles to Kennard, Texas, and has in addition to its main line track about 4 miles of switch yard, and passing tracks. At Lufkin, its tracks connect with those of the St. Louis Southwestern Railway Company of Texas, hereinafter called the Cotton Belt, the Houston, East & West Texas Railroad, the Groveton, Lufkin & Northern Railway, The Texas Southeastern Railroad, and the Angelina & Neches River Railroad. It has no other railroad connections. It maintains a joint agency with the Cotton Belt at Lufkin, has agency stations at Ratcliff, Texas, and Kennard, and has 6 sidetracks at other points where carload freight may be received or delivered. It owns 1 combination passenger, mail and express car, but no other rolling stock. It rents 1 light locomotive from the Cotton Belt, and pays per diem under the code rules for foreign cars while on its line. The only regular service it maintains is 1 mixed freight and passenger train daily, except Sunday between Lufkin and Kennard.

"The Eastern Texas was incorporated November 8, 1900, for 25 years under the general railroad incorporation laws of Texas, to construct a railroad from Lufkin to Crockett, Texas. Its line was constructed to Kennard in 1901 and 1902, and has been continuously operated since, though it has not been extended to Crockett. The Company was promoted and financed by individuals interested in the Texas-Louisiana Lumber Company, hereinafter called the Lumber Company, which is a subsidiary of the Central Coal & Coke Company of Kansas City, Mo. A substantial amount of applicant's right-of-way was donated to it by the owners of the land. It never received a land grant from the State, nor exercised the right of eminent domain. It was originally authorized to issue
6 $150,000 capital stock, which amount was increased in 1902 to $1,000,000. Shares of stock with a par value of $454,500, but no bonds, have been issued. On September 1, 1916, all outstanding stock of the Eastern Texas was acquired by the St. Louis Southwestern Railway Company, which except for the directors'

qualifying shares, still holds it. There is substantial identity between the officers of the Eastern Texas and the Southwestern.

"This line was constructed primarily to serve the Lumber Company, which then owned 116,000 acres of pine-timber land near Kennard, and had constructed at Ratcliff what is said to have been one of the largest mills in the South for the production of lumber and forest products. Applicant built numerous tram roads through his timber to connect with its main line. On August 28th, 1906, it sold these tram tracks, its current assets and rolling stock, aggregating in book value $94,604.49, to the Lumber Company. This sale was made in contemplation of the transfer of the Eastern Texas stock to the Southwestern for bonds of that Company stated to have been worth the par value of the stock and the fair value of the Eastern Texas as determined by the Railroad Commission of Texas.

"The Ratcliff mill ceased operation about 1917 and its tram tracks, machinery and practically all of its buildings have since been moved to locations not on applicant's line."

And the State, in its brief, makes the further admissions that

"The Cotton Belt Railroad, by reason of its ownership of the Eastern Texas stock has allowed fair division of freight; and has extended to the Eastern Texas Railroad Company credit; interstate traffic arising on such road has been almost completely handled by the cotton Belt; that the Cotton Belt Company is in a better position to furnish equipment, supervision, labor, supplies, and all things necessary for the operation, maintenance, and support of the Eastern Texas short line; that if the road is abandoned, the nearest railroad stations for the communities served by the Eastern Texas Railroad will be Crockett on the I. & G. N. Ry., seventeen miles from Kennard, and twenty miles from Ratcliff and Wells. Public highways in the county are not improved."

December 31st, 1919, the Railroad Commission of Texas placed a valuation on this property of $458,048.64. There are no bonds or other indebtedness of the Company. A credit of $42,228.06 on December 31st, 1917, represented earnings from January 1st, 1906. The mill at Ratcliff ceased operation in 1917. The road ceased operation April 30th, 1921. After the loss of traffic from the mill this credit was all absorbed, and up to April 30th, 1921, an added loss of $11,743.75 is shown, or a total loss since January 1st, 1918, of $53,972.01. The loss sustained under Government operation
7 for 26 months was $85,544.98, making a total loss up to April 30th, 1921, of $140,516.99. The Road has no cash or credit. What its physical property may bring at sale as salvage is its only asset: That is estimated to be about $50,000.00, less the cost of dismantling. Though widely advertised and offered for sale at that figure no bids were received.

Heavy expenditures on roadway and trestles will be necessary before operation can, with safety, be resumed. Two engineers—not in Railroad's employ—testified in June, 1922, that $250,000.00 would

be required,—the Engineer for the State Railroad Commission, on January 17th, 1921, reported that $120,000.00 would be sufficient. In July, 1920, the Interstate Commerce Commission's Engineer estimated the amount at $146,726.00. I find that on May 1st, 1921, when operation ceased, that a conservative and fair estimate would be $165,000.00, with an added expenditure of $20,000.00 before June 1st, 1922, a total of $185,000.00 to that date.

Result of Operation.

The income statements, and in fact all of the tabulated data covering income from operation, the expenses, and so forth, made by the Company, and like data during the period of Federal Control, and statements of tonnage, and of ratios of revenues and expenses, State and Interstate, from 1910 down to 1921, cover data filed by the Company, as required by law, with the Railroad Commission of Texas and the Interstate Commerce Commission. These figures are not questioned and are taken as correct.

The operating expenses from 1906 to 1917 averaged $52,577.63 per annum. The average operating revenue, per year, during the period was $66,711.38. There was no loss in operation for any year during that period except $41,012.28 in 1908, and $1,798.38 in 1909. Trestles were being rebuilt during those years. Operating costs from 1918 to April 1921 show heavy deficiencies—the year 1918, $20,128.46; 1919 $49,362.64; January and February, 8 1920, $17,053.88; and from March 1st to December 31st, 1920, $51,157.80; January 1st, 1921, to April 30th, 1921, there was a loss of $12,177.02.

During the year the mill ceased working—1917—all reserves of manufactured forest products on hand were passed over the road; also the dismantled mill, machinery and equipment moved over the road. This accounting for a heavy tonnage after the mill ceased operating.

Mr. Green, the Vice President of the Railroad, basing future costs upon costs of operation shown in June, 1922, estimates the future total cost of operation as $100,713.55 per annum,—as itemized the figures are:

"Cost per month of operating mised trains	$1,664.23
" " " " " Section and other maintenance of way items	2,592.69
Cost per month of operating stations	444.63
Total	$4,701.55
Total cost per annum	$56,418.56

"The above item, cost of operating mixed train, $1,664.23, only includes the wages of the train and engine men, and the fuel.

"To the total cost per annum, $56,418.56, must be added, on the basis of business done in 1920, the hire of equipment, $8,350.17 per

annum; taxes on 1920 basis, $3,952.41; joint facilities rents, $120.00; maintenance of equipment, $5,092.37; 500 ties per annum would have to be renewed at a cost of $1.25 each in the track, which for the thirty miles would be a charge of $18,750.00 additional. This makes a total cost of operation of $92,683.51. The above items, however, do not include the entire cost of operation, but when all of the items are figured in it was the opinion of Colonel Green that the total cost of operation would be $100,713.55."

This represents an increased cost for future operation over that of past operation up to 1917 of nearly 98%. The State claims that this is due to inefficiency and uneconomic management. The Railroad claims that increased cost of labor and material during the War period and subsequent thereto is responsible. The future average cost of operation per year will exceed by 60% the average per annum cost of operation for the first seventeen years, being
9 approximately $84,000.00. Future average annual estimated revenues from intrastate business is $20,000.00. The showing is a probable annual deficit for the future of $64,000.00.

The road was originally built to develop the 116,000 acres of pinelands owned and controlled by the Texas & Louisiana Lumber Company. From 1910 to 1921 eighty per cent of the traffic was lumber and forest products, practically all moving interstate from Ratcliff. From 1910 to 1917, inclusive, the average of interstate tonnage was 73 per cent, and 27 per cent intrastate; during the same period the average of revenues for interstate tonnage was 66 per cent; and 34 per cent intrastate. In 1920, 86 per cent of tonnage was intrastate, and 14 per cent interstate. In 1921, 91 per cent intrastate, and 9 per cent interstate. The same relative proportions obtained as to revenue.

A deficit from March 1st, to December, 1920, of $51,157.80 indicates that intrastate traffic alone is insufficient to pay the cost of operating the road. The four months ending April 30th, 1921, show a deficit of $12,177.02.

As to future tonnage from products of the forest, State witnesses Gibson and Denton estimate that 230,000,000 feet of lumber are available when cut and milled into lumber for shipment, or approximately 46,000 car loads. Railroad's witnesses Irving, on direct, and Berry and Meford, in rebuttal, qualified as men of special experience and of knowledge of the territory for a great many years. They are positive that all available tie timber had been cut by the Lumber Company, and the only other merchantable timber they found was in isolated, small tracts, held by the individual owners, and a few tracts on the lands of the Texas & Louisiana Lumber Company. The evidence further shows that the Mill at Ratcliff at that time had been moved from this territory for lack of available raw material.

What of future agricultural developments? The testimony
10 is conflicting. It is apparent, however, that the agricultural lands are confined to the low lands lying along the streams in that territory. The evidence shows that the cut-over pine lands are of the sandy and por-us soil. Experiments in agriculture by those

interested in the development of their lands have been unsuccessful. This portion of Texas was the first settled in the early years of the Republic,—more than eighty years ago. Agriculture there has never been a success. Large acreages representing cut-over lands are held by their owners in solido, practically none being offered for sale. Practically no corn has ever been shipped out over the road. The highest movement of cotton in any one year—1914—was more than 6,000 bales. Since then there has been a marked decrease: The average annual movement from 1910 to April 30th, 1921, was 2,200 bales. Revenue from cotton averaged $1.00 per bale.

In December, 1920, the Interstate Commerce Commission decided the same questions of fact that are before this Court, on practically the same evidence and conditions, as late in point of time as 1920. The Commission found by its order and Certificate of Public Convenience and Necessity that the railroad should be abandoned. This conclusion was reached having in view the earnings and future prospects of the road, both as to state and interstate carriage. The evidence of conditions and occurrences since the Commission hearing down to cessation of operation—April 30th, 1921—and as late as June, 1922, fully confirm the Commission's judgment.

The Railroad being no longer required to continue as an interstate carrier must rely for future revenue solely on its intrastate business. Its value in 1919, so found by the State Railroad Commission, of $458,048.64 had shrunk to a probable value as junk of $50,000.00 in 1921. Its total loss from twenty years' operation to April 30th, 1921—the date of cessation—was approximately $145,000.00. Expenditures on deferred maintenance and replacements necessary to put the road in safe and efficient condition for
11 future operation is fairly estimated at $185,000.00. Future averages annual cost of operation would be approximately $84,000.00; future average annual revenue from intrastate business would be around about $20,000.00; the annual deficit $64,000.00. The Charter expires November, 1st, 1925. The Company is without money or credit, or means to resume or continue operation during the lifetime of its Charter. These figures force the inevitable conclusion that the Railroad Company has reached the ultimate limits of any possible future activity, either physical or financial. It lies inert—practically bankrupt. In view of these facts can the State compel resumption and continuance of operation of the Railroad?—and prevent dismantling and salvage?

Law of the Case.

The Articles of Incorporation were filed October 27th, 1900, and conformed to the provisions of the general law. The object stated was for the purpose of "constructing, owning, maintaining and operating" a railroad. The eight Articles give (1) the name of the corporation; (2) the names of towns designated as termini; (3) the situs of its principal place of business; (4) the term of the Charter as 25 years from November 1st, 1900; (5) the amount of its capital stock; (6) the names of incorporators; (7) the names of its directors

and officers; and (8) the number of shares of stock and the par value of each. Thus far there existed only "permission" from the State and an "intention" on the part of the Company. The grant of Charter rights and powers became fixed upon the construction of the railroad, and remained so during its continued maintenance and operation. The powers granted, the opportunity afforded to realize a reasonable profit on the one side, and the dedication of the company's properties limited to use as a public highway for twenty-five years, were valuable considerations moving between the parties. Thus inchoate rights became vested. The Charter powers granted and the laws governing the status thus created, and the mutual rights, obligations and duties imposed, constituted a contract, so recognized since the Dartmouth College case, (4 Wheat. 518) and as such protected by the Constitution of the United States.

12

Opinion of the Court.

The State bases its right to require continued operation and prevent dismantling (1) upon breach of the Contract, and (2) upon express statutory requirement.

The Contract.

The contract does not prohibit, in so many words, the removal of the railroad track, but the obligation assumed by the Company to maintain and operate the road for twenty-five years, between certain designated points, are inconsistent with the right to remove. So long as the public uses the highway it must be maintained at the location designated. The Company must continue operation unless some contingency arises vitally affecting performance. It dedicates certain of its real and personal properties to a particular public use—a public highway. No right, title or interest in this property passes to the State or to the Public except the right of the public to use the property as a highway—a common carrier. As said in the Dartmouth College case, supra, "the property was private property * * *. Their (the trustees') right to hold the Charter, administer the funds, and visit and govern the College was a franchise solemnly granted them. The use being public in no way diminishes their legal estate in the property, or their title to the franchise." As in that case the Railroad retains physical possession and legal title to its properties, charged with the burden of their employment to the public use during the existence of the contract. In no other way is its legal estate diminished or burdened. The business of the Railroad as common carrier must be conducted subject to the restrictions, regulations and duties imposed by law. The state retains, in the interest of the public, the right to fix and to regulate the rates of carrying charges which the public must pay. From the standpoint of the railroad its ultimate object is to realize profit. The State's chief concern is to provide a highway of commerce for the public. The

13

two ends can only be reached by the continuous use of the property during the term of the contract. It is the gist of the whole case.

The Railroad's revenues are not sufficient either to pay current expenses, or a fair return on the investment. To compel operation would be to take its property without due process. This condition arises because the public fails to use the highway,—that is to say, the revenues derived from that use are insufficient to produce the net returns allowed by the law. The contract does not in terms provide or guarantee that the use made will be sufficient to do this. It may be that neither party has breached the contract, but the failure to use causes failure of revenue, and failure of consideration, and stops the continuous use of the highway. The public's failure to use is, therefore, the prime cause of the controversy. That revenues are inadequate and that property may be taken without due process follow the cause as inevitable effect.

The case of the State of Texas vs. Travis County (1893-85 Tex. 435), a decision by the Supreme Court of Texas, is authority for some of the propositions referred to. The Republic, later State of Texas, in 1839 dedicated a certain block of ground in Austin, Texas, to be used for the public purpose of a "Court House" and "Jail." The buildings were erected and were used for the purpose dedicated, by the County, until 1876. The Court House and Jail were then abandoned and new buildings for those purposes were erected at another location and occupied and used by the County ever since. The County, asserting title, brought suit against tenants for rentals due under lease contract. The State, through its Attorney General, intervened in trespass to try title. The lower courts found against the State which took its writ of error to the Supreme Court. The only issue was one of title. The Court holds
14 that the facts "show a dedication of the use of the block to the County * * * so long as the County might elect to occupy it for such purposes. The fee never passed out of the State." In the instant case the public secured the right to use the railroad highway, but the Company's legal title never passed. Speaking to the doctrine contended for by appellee to the effect "that by the dedication public rights were acquired in the use of the land which could not be impaired or destroyed by the action of either the County or State," the Court declines to give it general application in the case before it, and holds that the dedication must be unqualified and clearly intended for general public uses, but "instead of being general or unqualified * * * the privilege granted was to use the land for a Court House and "Jail." Therefore, the use by the public of Railroad's property, being for a limited and qualified purpose—that is to say a "highway," the principle that the public has acquired rights which could not be impaired or destroyed, as asserted by the State in the present case, has no application. The Court further says, p. 441, "The State had pledged the land only for specified uses, and when they were abandoned, there rested upon it no obligation to devote the property to purposes never consented to by it, by dedication nor otherwise, in favor of either the County, or purchasers of lots." The Court cites in support of

this proposition "Lewis on Em. Dom. Sec. 596; Washb. on Ease., 707; Ang. on Highways, Sec. 326; 5 Am. & Eng. Encyco. of Law, 419; 55 Pa. St., 350; 44 Ohio St., 406; 36 Barb, 136; 52 Conn., 256." The failure of the public to use the dedicated highway to such an extent as to afford fair compensation amounts practically to an abandonment. Being so, the dedicated use fails,—the Railroad ceases to be a public highway.

The Supreme Court of the United States has decided that the public cannot compel a railroad to run at a loss; that apart from Statute or express contract people who have put their money
15 into a railroad are not bound to go on with it at a loss, if there is no reasonable prospect of profitable operation in the future; that since the public may or may not use the highway, and the State retains the right to fix the compensation by regulating rates, the railroad is entitled to earn its expenses and a fair return upon its investment; that to deny such earnings and to compel performance of this duty would be to take its private property without due process of law contrary to the Fourteenth Amendment to the Constitution which provides that no State shall deprive any person of property without due process of law, or deny to any person the equal protection of the laws. (Commission cases 116 U. S., 307; C. M. & St. P. Ry. Co. vs. Minnesota, 134 U. S. 418; Budd vs. New York, 143 U. S., 517; Reagan vs. Farmers L. & T. Co., 154 U. S., 362; Smyth vs. Ames, 169 U. S., 464; Northern Pacific R. R. Co., vs. North Dakota, 236 U. S., 585; Brooks-Scanlon Company vs. Railroad Commission of La., 251 U. S. 376; Bullock, et al., vs. Florida, et al., 254 U. S., 513). In point of fact the State is not seriously maintaining the contrary to principles declared by these opinions.

That a Railroad having granted the public an interest in its use, it may withdraw its grant by discontinuing the use when that use can only be kept up at a loss. (Munn vs. Illinois, 94 U. S., 113; Brooks-Scanlon Company vs. Railroad Commission, supra.) Giving effect to this principle is to declare that notwithstanding the obligation of the Charter contract to construct, maintain, and operate the road as a common carrier between designated points for twenty-five years, the Railroad had the right to withdraw its property from use by the public unless adequately compensated, because in violation of the Fourteenth Amendment; That is to say, the amendment controls notwithstanding the obligation of the Charter contract. The law reads into the contract a proviso which says "the railroad may terminate this contract, and withdraw its prop-
16 erty from public use unless compensated, or there is a reasonable future prospect thereof. The State has directed attention to no particular provision of the contract which requires continued operation and maintenance and prohibits removal in any event—the Court find none and so holds. The contract fails to define the rights of the parties upon its termination. If the withdrawal from public use be permanent, as in this case, that constitutes recision, or abandonment. The contract terminates. The property reverts to its owner, freed of any claim of right in the State, or the public—unless such a right is created by Statute.

The Statute.

To maintain its position the State also relies on Title 115, Articles 6676 and 6625 of the Revised Statutes (1911) of the State of Texas, and the provision in the Constitution of Texas,—Article 10, Section 2, declaring Railroads to be highways.

Article 6676 requires that a railroad shall continue operation from day to day—the charter contract substantially covers this requirement. No authority is presented why this Article stands in the way of the application of the Fourteenth Amendment under the facts in this case. This Article and practically all of the regulatory enactments are effective only uring the existence of the contract: That is to say, while the public is making use of the Company's facilities to such an extent as will enable it to operate from day to day. The State does not maintain that "day to day operation" is required after the contract is terminated by failure of consideration, and consequent necessary and enforced lawful abandonment. Nor does the State contend that the Article affords justification for burdening the properties with a use which is and can no longer be lawfully exercised by the public.

The Constitutional designation that all railroads of the State are highways can only have reference to railroads that are going concerns. A highway is no longer a highway when the public
17 ceases to use it. The State's right to take private property under conditions that violate the fundamental paramount law must be founded upon something more substantial than mere declaration.

Article 6625, and interpretation given it by the Texas Courts are the main stays of the State's contentions. This Article became effective March 29th, 1889, prior to the grant of the Charter—1900. A copy follows:

Caption, "Railroads."

"Sec. 1.—As to rights of purchasers of roadbeds, etc., sold for debt.

"Sec. 2.—Jurisdiction over companies availing of the provisions of this law.

"Sec. 3.—Emergency clause.

"Section 1. Be it enacted by the Legislature of the State of Texas: That Chaper 11, Title 84, of the Revised Civil Statutes of the State of Texas, be amended by adding thereto the following article:

"Article 426*a*. That in case of any such sale heretofore or hereafter made of the roadbed, track, franchise or chartered right of a railway company or any part thereof, as mentioned in Article 4260 above, the purchaser or purchasers thereof and their associates shall be entitled to form a corporation under chapter one of this title, for the purpose of acquiring, owing, maintaining and operating the portion of the road so purchased as if such road or portion of the

road were the road intended to be constructed by the corporation, and when such charter has been filed the said new corporation shall have all the powers and privileges conferred by the laws of this State upon chartered railroads, including the power to construct and extend; Provided, that notwithstanding such incorporation the portion of the road so purchased shall be subject to the same liabilities, claims, and demands in the hands of the new corporation as in the hands of the purchaser or purchasers of the sold out corporation; Provided, that by such purchase and organization no rights shall be acquired under any former charter or law in conflict with the provisions of the present Constitution in any respect, nor shall the main track of any railroad once constructed be abandoned or removed.

"Section 2. No Railway Company availing itself of any of the privileges herein provided shall claim to be under the jurisdiction of the Federal Courts by reason thereof; and any railway company which may avail itself of the said privileges which shall claim to be subject to the jurisdiction of the Federal Courts in pursuance of this article shall ipso facto forfeit its re-organization and be remanded to the same condition as it was prior to said co-organization.

"Section 3. Whereas there is in existence no law which sufficiently provides the manner in which a railroad company sold out under decree of the court or otherwise may form a corporation for the purpose of acquiring, owning and extending such sold out property, and the lateness of the session, create an emergency an imperative public necessity authorizing the suspension of the constitutional rule requiring bills to be read on three several days, and that this
18 act shall take effect and be in force from and after its passage, therefore it is so enacted."

This Act is supplementary to Article 4620, which provided that where a railroad and its franchises were sold, the purchaser took the property and charter rights, and had a right to operate the road.

Article 4260*a* was amended by the Act of September 1st, 1910, but the material provisions were unchanged. Article 4260*a* was made a part of Title 84, Rev. Stat. Texas of 1879. p. 593—Subject "Railroads", divided into 13 Chapters, each with guiding sub-titles. Chapter Eleven, p. 612, sub-titled "Collection of Debts from Railroad Corporations" included this Article along with others, each given sub-title. Article 4260*a* was carried into Rev. Stat. Texas of 1895, Title 94, p. 874, same subject, same chapter, and incorporated as Article 4550; and as amended September, 1910, was carried into Rev. Stat. Tex. of 1911, Title 115, "Railroads," p. 1374, same chapter eleven, same sub-title, Article re-numbered as 6625, sub-titled "New Corporations in case of sale may be formed, how". The general subject title 115 "Railroads" contains 19 chapters and 348 articles. Brefing the chronology of the Article shows Rev. Stat. 1879 incorporated in 1889 as Article 4260*a*, incorporated into Revised Statutes 1895 as Article 4550, and incorporated into Rev. Stat. 1911 as Article 6625. This Article was considered by the Sup-

reme Court of Texas in State vs. Enid R. R., (108 Tex., 239) a case relied on by the State as authority prohibiting dismantling.

The Act prohibiting the abandonment or removal of the main track of any railroad was not intended to be general in character. This prohibition is clearly intended to be limited only in cases where a railroad has been sold out under foreclosure. The Legislature had in mind the purpose to require the purchasers of "sold out" railroads to continue to maintain and operate them by
19 preventing abandonment or removal of main tracks. The word "any" would infer a purpose to make the prohibition affect all railroads. The caption of the Act and its emergency clause evidence a contrary intention. The accepted rules of construction and interpretation of statutes would give this Act application only in those instances where the railroads were sold and new corporations were to succeed the old.

The Constitution of the State of Texas provides—Article III, Section 30,—"No bill shall be amended so as to change its original purpose," and in Section 35 "No Bill (except general appropriation bills) sall contain more than one subject which shall be expressed in the title. But if any subject shall be embraced in an Act, which shall not be so expressed in the title, such Act shall be void only as to so much thereof as shall not be so expressed." Some of the objects of these sections are; to prevent embracing in an Act, having a single purpose, irrelevant provisions having other and different objects, thus to conceal and disguise the real purpose under a misleading and deceptive title; to prevent bringing together into one Bill diverse subjects to secure support of advocates of all, neither of which could succeed on its own merits; to remedy the practice by which, through cunning management, clauses are inserted in Bills of which the title gave no intimation, thereby securing passage of bills, members being misled and unaware of their real scope and effect,—in modern vernacular, putting in the "joker". These sections, in point of fact, are given a liberal construction and in line with an elementary canon of statutory construction, that the subject of an Act must conform to and be germane to its purpose.

The very first words in the Act refer to the Article 4260 which it supplements, and its subject—the sale of a road and its properties. In the revision of the laws, 1895, it was made a part of Chapter Eleven, and given its subtitle "New Corporations, in case of sale", retaining its same title and place in the revision of 1911. If
20 the subject and the purpose of this Act was to declare a rule of law that all railroads in the State could no longer be abandoned or removed, it could find no proper place under a title that had to do with the formation of new railroad corporations "in case of sale". One or two of the chapter headings under the title 115 "Railroads" would indicate where a law of general effect should be placed; for instance, under head of Chapter 10, which is subtitled "Restrictions upon the duties and liabilities of Railroad Companies"; or Chapter 19 headed "General Provisions". It seems therefore that to give the prohibitory words a wide and general meaning would be to say that the subject of the Act has a double signifi-

cance contrary to the plain requirements of the Constitution, and not germane to its title. Article 4260*a* has been the subject of comment and interpretation. The first appears in an opinion by District Judge Key in the case of Texas vs. East Line & Red River Railroad Company, rendered February 8th, 1891. (English Railroad cases, vol. 48, p. 660). That was a case where a railroad charter was forefeited and the property placed in the hands of a receiver. The Court, referring to this Article of the Statute, says: "The Act of March 28th, 1889, now Article 6625, providing for the sale of a railroad and authorizing the purchaser to incorporate, declares 'nor shall *be* main track of any railroad, once constructed and operated, be abondoned or removed'. Whether this statute can be invoked against any one not a purchased at such sale as referred to in the Act, may not be clear".

In Wexler vs. the State (241 S. W., p. 234) The Galveston Texas, Court of Civil Appeals, April 13th, 1922, in a case where an interurban railroad had been "sold out", interpreting the Article in question, then bearing its new number 6625, the Court in effect holds that the primary purpose of the Legislature was to provide a means by which the purchaser of a railroad organized under title 115 of the statute, and which had been sold under a foreclosure decree, could obtain a new charter for the operation of such railroad.

21 In Enid Railroad vs. State—Court of Civil Appeals, December 1915—(181 Southwestern) it is held that "Article 6625 in reference to 'new corporations in case of sale,' provides for the formation of a new corporation for the purpose of acquiring, owning, maintaining and operating "sold out" railroads,"—then follows an excerpt from the prohibition as to abandonment. The Court states that this prohibition is declarative of the common law, and that the Article is important only as declaring a general policy of the State in case of a "sold out" railroad. The emergency clause, Sec. 3 of the Act, Art. 4260*a*, definitely declares that the emergency existed because "there is no law which sufficiently provides a manner in which a sold out company under decree of a court, or otherwise, may form a corporation for the purpose of acquiring, owning, and extending such sold out property." Considering the constitutional provisions, and the rule of statutory construction that the subject of the Act must conform to and be germane to its purpose, the Court, having also in mind the presumption that a law is constitutional, and giving a liberal construction to the statute, holds that the prohibitory provision against abandonment or removal by a railroad company applies only to the case of a "sold out" corporation.

The Enid Case Dictum.

The State's contention as to the general effect of the Article is based wholly on the decision of the Supr-me Court of the State of Texas in the case of Texas vs. the Enid O. & W. R. R., (108 Tex., 239). That was a case where a railrad company had been constructed and operated, later abandoned, a receiver appointed, the property sold, and the purchasers forbidden to remove the tracks.

The gist of the Court's decision is contained in the following excerpt from opinion: (p. 245.)

"When the old company accepted the charter they impliedly consented to be bound by the provision of law to the effect that
22 they would not move it. When plaintiffs in error purchased the road and its franchises they became likewise obligated. We think they are bound by contract and by statute law not to move any portion of the main track, and that since they are attempting to do so they should be enjoined to desist therefrom. By the terms of Art. 6625, Vernon's Sayles' Civil Statutes, it is provided, in substance, that the 'main track' of any railroad, once constructed and operated, shall not be abandoned or moved.' We think the defendants in error should not be permitted to take up the rails and ties in violation of said statute."

This case had come from the Court of Civil Appeals by way of Writ of Error, that Court holding that the track could be removed, and the road abandoned as such. (Enid O. & W. R. R. vs. State, 181 S. W., 498.) The Supreme Court in its opinion did not refer to the rights which the Enid railroad might have under the provisions of the Constitution of the United States. The facts in the Enid case show the railroad in that case to have been a "sold out," railroad, and therefore was a case to which the terms of Art. 6625 had special application. The Court did not intend to give the article any broader scope than the facts in the particular case warranted. The Enid case is not authority sustaining the State's position that the Article has general application. The Railroad is not being "sold out" in this case, or purchased under the provisions of the Article. The Court referred to no other statute when it stated that the defendants were bound by the statute law not to abandon or move the main track. It may not be relied upon as a decision of the highest court of the State upon a question of local law, and thus binding upon the National Courts, because the effect of the decision must be limited to the facts and the law of that particular case. If the decision intends to extend the prohibition against abandonment or removal of any railroad, without limitation, thus giving it general effect, the holding would be unnecesary to the decision of that particular case and consequently dictum, and not an authority upon that point.

Unless definitely and unmistakably fixed by Statute, or by the terms of the contract itself, the State could not arbitrarily prevent the sale by the carrier of any of its property where it was
23 no longer reasonably probable that the State, or the public, would use it for the purpose for which it was dedicated under the terms of the charter.

As previously stated the only right, title and interest which the State has in the property is the right to use it in the interest of the public. If circumstances occur which render it incapable of being so used then the State and the public cease longer to have any further interest therein. To lay hands on the property under these

circumstances to prevent its dismantling or removal by its owners, after abandonment, would effectually operate as a taking without due process of law.

The extent to which Federal Courts are bound by the interpretation of state statutes by State Courts is shown in cases where conflicts arise with the National Contitution, and where rights accrued before adverse construction by the State Courts. The Enid case is in conflict with the Constitution. In Missouri Pacific Railway vs. Nebraska (164 U. S., 403) the court says: "The taking by a state of the private property of one person or corporation, without the owner's consent, is not due process of law * * *," violative of the Fourteenth Amendment, Railroad was chartered in November 1900,—the Enid Case was decided February 7, 1917.

Federal Courts are not bound to follow the decision of the State Court, where rights have accrued under decisions or for lack of decisions of the state tribunals. The Federal Courts having co-ordinate jurisdiction may adopt their own interpretation of the laws although the State Courts may stand on a different interpretation after rights have accrued: (Burgess vs. Seligman, 107 U. S., 20; Kuhn vs. Fairmount Coal Co., 215 U. S., 349).

What has been said concerning Article 6625, and as to whether it should be given general or special application, and as to the effect of the decision in the Enid case forces the conclusion that
24 the article should not be given general but special and limited application: Further, that the decision of the Supreme Court in the Enid case, for the reasons stated and the facts found to exist, is not authority binding upon the Federal tribunals, or upon the Eastern Texas Railroad.

Abandonment.

The cases authorizing railroads to suspend or abandon operation under given circumstances are legion. Some of them have been referred to. The leading case upon the question as to whether or not a railroad may permanently discontinue its functions as a common carrier, or may wholly abandon its services to the public, dismantle, sell and salvage its property, is the case of Jack vs. Williams (113 Fed., 823) decided by Judge Simonton of the District of South Carolina, on February 1st, 1902. The facts found by the Court, as to ultimate conclusions, are the same as in this case. It appeared in that case that to compel the railroad's operation at a certain loss, or to keep it intact, unused, would be to deprive its owners of their property without compensation. Accordingly the Receiver was ordered to dismantle the road, and sell the material. As a presentment and discussion of all the then cases bearing on the issues in this case, and as the decision of a learned and eminent Jurist, the entire opinion ought perhaps to be embodied here. The case is authority for the abandonment of a railroad and the dismantling and sale of its properties. The Court cites it as such,—also as cumulative authority upon some of the other vital issues in this case. The

reasoning of the Court is identical with the reasoning employed by the Supreme Court of the United States in the cases cited, supra, wherein the principle is maintained that a railroad could not be required to "operate at a loss. If one's property is taken without due process in the instance of loss from operation, it is equally so taken in the instance where the effort is to restrain an owner from dismantling an abandoned property no longer being used
25 nor capable of being used in the public service. In estimating the value of this case as authority it is noted that the Court's finding was affirmed by the Circuit Court of Appeals, (145 Fed. Rep., p. 281). The Court of Appeals refers to the obligation imposed upon the owners of a railroad to maintain it as a highway, but in view of the facts in that case in affirming the action of the lower court, stated:

"The opinion of the late Judge Simonton in the Court below carefully recites all the facts connected with the attempts to operate the road, he having appointed the first receiver and being familiar with its history, and it seems to us unnecessary to further add to his convincing statement of the ground upon which the cross bill was dismissed."

Jack vs. Williams has been cited with approval in other cases where the same principles of law are maintained—that a railroad could be abandoned and disposed of to the best interest of a mortgage by sale, (New York Trust Co. vs. Portsmouth & Exeter Ry., 192 Fed., 728). State vs. Old Colony Trust Company, 215 Fed., 307,—C. C. A,—; Gilchrist vs. Wayeross Ry., 246 Fed., 952; and a number of decisions to the same effect from the appellate courts of the various states.)

In this case certain individual defendants are joining the State of Texas, and its Railroad Commission, in the effort to require continued operation and to prevent dismantling or removal of the railroad. Their rights as parties appear to rest upon their general status as residents and members of the community, or country, theretofore served by the Railroad. Where private property is dedicated to the public, and the use limited to a particular purpose by the terms of the charter contract all having an interest in the matter are charged with notice that the abandonment of a particular use by the public would terminate the charter contract and authorize withdrawal of the private property from the particular use, thus destroying any right the public may have had in the property.
26 Whatever interest others had in the use of the property was acquired with the knowledge of, and subject to, the contingency which has arisen in this case, (Texas vs. Travis County, 85 Tex., 441, supra; Jack vs. Williams, 113 Fed., 823, supra; the same case on appeal, 145 Fed., 281, supra; Central Bank & Trust Corporation vs. Cleveland 252 Fed., 530.

From the foregoing it results that the State of Texas in the suit numbered 323 should take nothing; and that the injunction issued by the State Court should be dissolved; and, further, that the defendant, The Railroad, should be authorized to abandon its railway

as to intrastate as well as interstate traffic; and also to remove its ties, rails and track, and dismantle all of its structures and property, and to dispose of them by sale or otherwise as it may be advised. It also results that the Eastern Texas Railroad Company, plaintiff in number 325, is entitled to have the temporary restraining order, heretofore issued in this cause, against all of the defendants, made perpetual. Final orders and decrees carrying into effect the conclusions of the court, as herein expressed will be entered in due course.

Done at Austin, Texas, on August 11th, A. D. 1922.

(Signed) DU VAL WEST,
U. S. District Judge.

27 In the United States District Court for the Western District of Texas, Austin Division.

In Equity.

No. 325.

EASTERN TEXAS RAILROAD COMPANY, Plaintiff,

vs.

RAILROAD COMMISSION OF TEXAS et al., Defendants.

Stipulation as to Record on Appeal.

It is hereby agreed by and between the parties to the above entitled cause, under the provisions of Equity Rule 77, that the questions presented by this appeal can be determined by the appellate court without an examination of all the pleadings and evidence, and that the foregoing statement of the case shows how the questions arose and were decided in the District Court, and sets forth so much only of the facts alleged and proved or sought to be proved as is essential to a decision of such questions by the appellate court. It is further stipulated and agreed that the foregoing shall constitute the record on appeal in the above entitled cause and need not be certified by the Clerk of the District Court except as an agreed record.

E. B. PERKINS,
E. J. MANTOOTH,
DANIEL UPTHEGROVE,
W. B. HAMILTON,
Solicitors for Plaintiffs.
W. A. KEELING,
Atty. General;
WALACE HAWKINS,
I. D. FAIRCHILDS,
Solicitors for Defendants.

28 In the United States District Court for the Western District of Texas, Austin Division.

In Equity.

No. 325.

EASTERN TEXAS RAILROAD COMPANY et al., Plaintiff-,

vs.

RAILROAD COMMISSION OF TEXAS et al., Defendants.

Order as to Agreed Record on Appeal.

In the above entitled cause, all parties agreeing thereto, it is ordered that the record annexed to the foregoing agreement of counsel as to the record on appeal shall constitute the record on appeal and that the clerk shall certify it as an appeal record without examining it and without charge except such as may be lawfully made for the certificate itself.

DU VAL WEST,
Judge.

29 *Final Decree.*

The United States District Court, Western District of Texas, Austin Division.

In Equity.

No. 325.

EASTERN TEXAS RAILROAD COMPANY, Plaintiff,

vs.

THE RAILROAD COMMISSION OF TEXAS et al., Defendants.

On this the 11th day of August, 1922, in open court came on to be heard Defendants' joint motion to dissolve the temporary restraining order issued April 28th, 1922, as prayed for by Plaintiff in its Second Amended Bill of Complaint, and to dismiss Plaintiff's said Bill; and parties plaintiff and Defendants, by counsel, being present, and announcing ready, the said joint motion was thereupon submitted, and after hearing the argument of counsel, and duly considering same, the Court is of opinion that the said joint motion should be denied; It is accordingly so ordered.

Then came on for final hearing Plaintiff's Second Amended Bill of Complaint, Defendants' original, Amended and Supplemental Answers, and Plaintiff's reply thereto; and the evidence having been submitted, and the cause having been argued by counsel, the Court,

upon consideration thereof, finds with the Plaintiff, the Eastern Texas Railroad Company, and against the Defendants, The Railroad Commission of Texas, Allison Mayfield, Earle B. Mayfield, Clarence E. Gilmore; W. A. Keeling, Attorney General of the State of Texas; Cotton Belt Lumber Company, A. F. Daniels; Kennard Mercantile Company, Dr. T. M. Sherman, I. A. Daniels, J. H. Painter, and I. D. Fairchild; and that Plaintiff, Eastern Texas Railroad Company is entitled to the relief prayed for.

It is therefore ordered, adjudged and decreed by the Court
30 that a perpetual injunction issue out of and under the Seal of this Court, directed to the Defendants, the Railroad Commission of Texas, Allison Mayfield, Earl B. Mayfield, Clarence E. Gilmore, W. A. Keeling—Attorney General of the State of Texas, the Cotton Belt Lumber Company, A. F. Daniels, Kennard Mercantile Company, T. M. Sherman, I. A. Daniels, J. H. Painter, and I. D. Fairchild, enjoining and restraining them, and each of them, their successors in office, their servants, employes, agents, attorneys, and other persons acting under the control and authority of each and all of said defendants, and all other persons of the class of which the defendants, or any of them, are representative, from commencing any suit or proceedings against the plaintiff, the Eastern Texas Railroad Company, for the recovery of damages, fines or penalties, under the provisions of the Laws of Texas, or any other provisions of Law, which would prevent, or tend to prevent, the Plaintiff, the Eastern Texas Railroad Company, its agents, servants, attorneys and employes, from abandoning the operation of said railroad, or all parts thereof, in intra-state commerce and in interstate commerce, or from doing any act which would prevent, or tend to prevent, the plaintiff, its agents, servants, attorneys and employes, from dismantling said line of railroad and salvaging, taking up, removing and disposing of the tracks and structures constituting the same, to the best interest of the plaintiff and the stock-holders of plaintiff, or any other parties at interest; or which would prevent the said plaintiff from disposing of the said salvage together with the rights of way, depot grounds, and any other part or parcel of the real estate connected therewith, to the best advantage of this plaintiff, and the stock-holders thereof, and other interested parties; or from making the sale of such property at either public or private sale on such terms as the plaintiff may determine to its best advantage.

That the said plaintiff recover of and from the defendant, the State of Texas, all costs in this behalf expended.

To which judgment and decree the defendants then and there in open Court excepted and gave notice of appeal.

DU VAL WEST,
United States District Judge.

31 In the United States District Court, Western District of Texas, Austin Division.

In Equity.

325.

EASTERN TEXAS RAILROAD COMPANY, Plaintiff,

vs.

THE RAILROAD COMMISSION OF TEXAS et al., Defendants.

Assignments of Error.

Now come defendants in the above entitled cause and file the following assignments of error upon which it will rely upon its prosecution of the appeal in the above entitled cause from the judgment and decree perpetually enjoining and restraining these defendants from bringing suits for penalties or proceedings, or from doing any act or thing interfering with the cessation of operation or dismantling of the railroad of said defendant, the Eastern Texas Railroad Company, which judgment and decree was made and entered by this Honorable Court on the 11th day of September, A. D. 1922.

I.

The United States District Court for the Western District of Texas erred in its judgment and decree perpetually enjoining the defendants, the Railroad Commission and the Attorney General of the State of Texas, from enforcing or causing to be enforced the charter
32 contract and obligations of the plaintiff, the Eastern Texas Railroad Company, requiring the construction, maintenance and operation of its line of railway during the existence of its charter and until the termination thereof.

II.

The United States District Court for the Western District of Texas erred in its judgment and decree perpetually enjoining the defendants, the Railroad Commission and the Attorney General of the State of Texas, from enforcing or causing to be enforced the valid and binding statutes of the State of Texas requiring said defendant to operate and maintain its line of railway and prohibiting cessation of operation and dismantling thereof during the existence of its charter and until the termination thereof.

Wherefore appellants pray that said judgment and decree be reversed and that a decree be entered vacating and dissolving said injunction, and that plaintiffs take nothing by their suit.

W. A. KEELING,
Attorney General;
WALACE HAWKINS,
Assistant Attorney General,
Solicitors for Plaintiff.

33 United States District Court, Western District of Texas, Austin Division.

In Equity.

No. 325.

EASTERN TEXAS RAILROAD CO., Plaintiff,

vs.

RAILROAD COMMISSION OF TEXAS et al., Defendants.

Petition for or Claim of Appeal.

To the Honorable — Court of the United States for the Western District of Texas:

Now come the defendants herein, the Railroad Commission of Texas, Allison Mayfield, Earle B. Mayfield, Clarence E. Gilmore, and W. A. Keeling, Attorney General of the State of Texas, by W. A. Keeling, Attorney General for said State, and Walace Hawkins, Assistant Attorney General, its solicitors, and says that the defendants are aggrieved by the judgment and decree of this Honorable Court, entered on the 11th day of August, A. D. 1922, in the above entitled, numbered cause, by which judgment a temporary restraining order was therefor issued in said cause, against all of the defendants, wherein said defendants were enjoined and restrained from commencing suits or proceedings, for the collection of fines or penalties against the Eastern Texas Railroad Co., for failure to operate and maintain its railroad in intrastate commerce, which temporary injunction was made perpetual in that these defendants are denied the right to effectively enforce the statutes of the State of Texas, regulating, controlling and governing the cessation of operation and disbanding of physical properties of interstate railways, incorporated under the laws of the State, and wherein it is denied the right and power to compel the Eastern Texas Railway Co. to comply with its charter contract and preexisting laws of the State of Texas, under which it is obligated to operate its railway system until Nov. 1, 1925, the date of expiration of its charter.

34 Therefore, this defendant claims an appeal from such judgments and decree, and prays that the same may be allowed by an order of this Honorable Court, and that the *the* record may be duly certified and forwarded to the Supreme Court of the United States, as is provided for by law.

____ ____,
Attorney General;

____ ____,
Assistant Attorney General,
Solicitors for Defendants.

35 United States District Court, Western District of Texas, Austin Division.

In Equity.

No. 325.

EASTERN TEXAS RAILROAD CO., Plaintiff,

vs.

RAILROAD COMMISSION OF TEXAS et al., Defendants.

Order Allowing Appeal.

At a session of said court, held at 10:00 A. M., in the Federal Building in the City of San Antonio, Texas, on the — day of September, 1922.

Present: Hon. Duval West, District Judge.

On reading and filing, in the above entitled cause, the petition of defendants, for an appeal to the Supreme Court of the United States, it appearing to the court that the defendants having filed their assignments of error and claim of appeal, as required by the rules of the Supreme Court of the United States, it is

Ordered That an appeal be, and the same is hereby, allowed, as prayed for, from the judgment and decree of this court, made on the — day of August, A. D. 1922, wherein defendants are perpetually enjoined from bringing suits for penalties or proceedings, or in any way interfering with the cessation of operation of plaintiff's railway, or the dismantling of same, and in all things granting plaintiff the remedies as prayed for.

____ ____,
District Judge.

36 THE UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

The President of the United States to Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove, and E. J. Mantooth, Appellees, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to appeal allowed and filed in the Clerk's office of the District Court of the United States for the Western District of Texas, in the cause wherein The State of Texas is appellant and the Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, are appellees, to show cause, if any there be, why the decree rendered against the said The State of Texas, as in said appeal mentioned, should not be

corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this — day of September in the year of our Lord one thousand nine hundred and twenty two.

Signed this, the — day of September, 1922.

——— ———,
United States Judge.

(Endorsed:) No. 325. Eq. Eastern Texas Railroad Company vs. Railroad Commission of Texas, et al. Citation. Marshal's Return. Service of this Citation is hereby accepted this — ——, 1922. E. B. Perkins, Daniel Upthegrove, E. J. Mantooth, Solicitors for Appellees, Filed — ——, 1922. D. H. Hart, Clerk, By —— ——, Deputy

37 *Clerk's Certificate.*

I, D. H. Hart, Clerk of the United States District Court for the Western District of Texas, do hereby certify that the foregoing on pages Numbered from 1 to 36, inclusive, contain a true and correct transcript of agreed record on appeal, decrees of the court, assignments of error, copy of citation therein, in Equity No. 325, styled Eastern Texas Railroad Company vs. Railroad Commission of Texas et al., as appears of record and remains on file in my office at Austin, Texas.

Witness my hand and official signature and seal of said District Court, at office in the City of Austin, Texas, on this the 9th day of September, 1922.

[The Seal of the U. S. District Court, Western Dist. Texas, Austin.]

D. H. HART.
D. H. HART,
Clerk of the U. S. District Court,
By —— ——,
Deputy.

Endorsed on cover: File No. 29,229. Western Texas D. C. U. S. Term No. 679. The State of Texas, plaintiff in error, vs. Eastern Texas Railroad Company, E. B. Perkins, F. W. Green, et al. Filed November 2d, 1922. File No. 29.229.